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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, Employer/Respondent, and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Charging Party/Petitioner.	Case Nos. 21-CA-095151; 21-RC-091531; 21-RC-091584 **CHARGING PARTY'S REPLY TO ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL**

The Charging Party files this Reply Brief concerning one position suggested by the Answering Brief of the Counsel for the General Counsel to Exceptions of Respondent and Employer to Decision of the Administrative Law Judge" (hereinafter General Counsel's Answer Brief).

The General Counsel's Answer Brief suggests a restricted approach to the right of employees to use electronic communications for Section 7-protected purposes. The Board should clearly and expressly reject this analysis.[1]

[1] In all other regards we support the Brief.

As we have explained in Charging Party's Reply Brief to Exceptions and Charging Party's Brief in Support of Cross-Exceptions (both filed on June 23), employees should have the right to use electronic communications during work time for Section 7 protected activities subject to the limitations we discussed in those briefs. As we have explained in those briefs, the Board has on many occasions found that employees may not be disciplined on account of the use of electronic communications during work time for Section 7 protected communications.

The General Counsel's Answer Brief suggests that there is no Section 7 right to use electronic communications during work time. Footnote 6 of the Brief states:

> This argument conveniently ignores several undisputed facts of the nature of the work performed by VIs (using their hands to perform sign-language translation for Respondent's customers) and the productivity standards to which VIs are held, both of which provide a clear disincentive for Respondent's employees to mis-use their working time by using it to draft or send Section-7-related email messages.

See footnote 6, pg. 6.

As suggested in the footnote it is a "mis-use" of "working time" to draft or send Section 7 related email messages

The Brief also asserts that that "the Board explain[ed] in *Purple I*, [*Purple Communications*, 361 NLRB No 126 (2014)] email messages are not the same as oral communications, yet they are also not identical to printed literature, which may be distributed." *Id.* at p 7. As suggested in the further quote the Brief suggests that email is more like solicitation which can be limited to non-work time because it is not just "communication."

This is not exactly what Counsel for the General Counsel argued to the Board in its Brief in *Purple I.* In that Brief the Counsel for the General Counsel stated:

> The Board should hold that employees who use their employer's email for work purposes have a statutory right to use it for Section 7 activity during nonwork time, absent a showing of special circumstances relating to the employer's need to maintain production and discipline." Brief at p. 22.

The Brief submitted in *Purple I* did <u>not</u> address the use of emails or electronic communication during work time. The Brief <u>avoided</u> this question entirely.

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Nor did the Brief assert that emails are like solicitation and should be treated the same. The Brief asserted that

> T]he Board should therefore apply the *Republic Aviation* [324 U.S. 793 (1945)]framework to technological workplace communications and hold that where an employer that has provide computers and electronic communications systems to employees for work, those employees have a Section 7 right to use those systems during nonwork time, absent a showing that special circumstances relating to production or discipline outweigh the employee's Section 7 rights, See *Republic Aviation*, 324 U.S. at 803 n. 10

Nowhere did the Brief of Counsel for the General Counsel in *Purple I* assert that electronic communication was like "solicitation" and could be expressly limited to nonwork time. All that the Counsel for the General Counsel argued was that there should be an affirmative right to use email during nonwork time. The General Counsel's failure to address work time was unfortunate and misleading. Although Charging Party agrees that employees have the right to use the electronic communications systems during nonwork time absent special circumstances, they also have the right to engage in Section 7-protected communications during worktime.

The Board in *Purple I* also did not address the question of working time. It avoided this issue. All the Board did was hold:

> Accordingly, we will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time." 361 NLRB No. 126 at p. 14.

Although the Board did adopt a rationale relying on the balancing or accommodation principles of *Republic Aviation*, it did not hold that emails are like or equivalent to solicitation. To the contrary it emphatically rejected that view:

> For all these reasons, we find *Republic Aviation* to be a more appropriate foundation for our assessment of employees' communication rights than our own equipment precedents.
>
> In doing so, we recognize that significant differences exist between an employer-owned email system, like that at issue here, and an employer's bricks-and-mortar facility and the land on which it is located, which were involved in *Republic Aviation* and many subsequent cases. Indeed, an email system is substantially different from any sort of property that the Board has previously considered, other than in *Register Guard* itself. Accordingly, we apply *Republic Aviation* and related precedents by analogy in some but not all

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> respects. In particular, we do not find it appropriate to treat email communication as either solicitation or distribution per se. Rather, an email system is a forum for communication, and the individual messages sent and received via email may, depending on their content and context, constitute solicitation, literature (i.e., information) distribution, or--as we expect would most often be true--merely communications that are neither solicitation nor distribution, but that nevertheless constitute protected activity. We also find it unnecessary to characterize email systems as work areas or nonwork areas.
>
> Id at p. 12-13(footnotes omitted)[2]

Thus Board was clear that in most cases email would not be solicitation. The General Counsel's Answer Brief is thus misleading.[3]

The Board needs to be clear. Email or other electronic communication are not likely to be solicitation although they could be depending on the content. They are a form of communication, they are the equivalent of talking, and the Board began its analysis by emphasizing this:

> The necessity of communication among employees as a foundation for the exercise of their Section 7 rights can hardly be overstated. Section 1 of the Act unequivocally states:
>
> It is declared to be the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and [to] protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
>
> National Labor Relations Act, 29 U.S.C. § 151. Section 7 of the Act thus grants employees the "right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Such collective action cannot come about without communication. As the Supreme Court stated in *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972):
>
> [Section 7] organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the

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[2] Footnote 58 which is within this text reads: "See, e.g., *Fremont Medical Center*, 357 NLRB No. 158, slip op. at 2-3 and fn. 9 (2011) (distinguishing "union talk" from solicitation; citing cases); *Jensen Enterprises*, 339 NLRB 877, 878 (2003) (same)" See *Conagra Foods, Inc.*, 361 NLRB No 113 (2014)

[3] The Brief is also misleading when it asserts "the relevant precedent is *Republic Aviation*, not *Stoddard-Quirk*." (footnote omitted) p 7. Although the Board in *Purple I* found that email was not like distribution and that the balancing test applied, it recognized that email was most often communication, not distribution and not solicitation.

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> Board recognized the importance of freedom of communication to the free exercise of organization rights.
>
> *Purple I at p 5.*

In summary then the Board never held that employees cannot use electronic communications systems for Section 7-protected communications during work time. And the Board should make this clear. Otherwise *Purple I* may be read to prohibit use of electronic communications by Section 7-protected communications during worktime.

Indeed the Board has found on many occasions that employees have Section 7 rights to use email during work time for protected communications. See Charging Party's Reply Brief to Exceptions of Respondent at p 20-22 and Charging Party's Brief in Support of Cross-Exceptions p 25-27. As those cases illustrate, employers depend on electronic communication to communicate about work issues including issues of wages, hours and working conditions. And employees do the same sometimes in response to employer communications. Thus these communications between employees and between employees and employers are part of the normal communication that occurs constantly in the workplace. Those communications are often Section 7-protected communications.

Moreover the record establishes and the ALJ found that employees use email during work hours:

> Employees use the company email system on a daily basis while at work for communications among themselves. The company email is also use for communications among managers and employees. ALJD p. 3: 16-20

Moreover as extensively detailed in Charging Party's Brief in Support of Cross-Exceptions the record establishes unchallenged use of email for work related communications including Section 7-protected communications during worktime. See Charging Party's Brief in Support of Cross-Exceptions pp. 9-11. This workplace illustrates these principles.

The Board in *Purple I,* did not adopt the proposition that electronic communications are like solicitations and for that reason may be limited to nonwork time. That simply is a misstatement of the Board's decision.

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All the Board did was announce a rule that electronic communications are protected when they are engaged in during nonwork time. The Board did not suggest that employees lose their Section 7 protection because they use electronic communications during work time.

For the reasons stated in our Brief in support of Cross-Exceptions and in our Answering Brief to the Cross-Exceptions of the Respondent, the Board should hold that employees do have a Section 7 right to use electronic communications during work time. As is fully illustrated in this record, employees do use electronic communications during work time and it doesn't interfere with productivity, nor does such use interfere with any clearly established rules which the employer has implemented to limit such use.

We submitted the following summary in our Brief in Support of Cross-Exceptions:

> In summary, where an employer such as Purple generally allows employees access to an email system, the law should create a presumption that such access allows for communication of matters relating to working conditions, including relating to efforts to form, join or assist a labor organization or for mutual aid and protection within the meaning of Section 7. Such a presumption could be rebutted by an employer who expressly limits the email system *during work time* to specific and defined business uses or limits and demonstrates that it strictly enforces such a rule. However, the employer could not impose such a limit during non-work time. Where such business uses include matters of wages, hours or working conditions, employees may use such communication systems for communications relating to working conditions during work hours. We believe this is a practical approach that accommodates employer interests and the Section 7 rights of employees under the Act. We believe the Board's Decision in *Purple* does this implicitly. *Purple*, however, makes it clear that an employer's interests are accommodated by allowing employees to use the electronic communications systems during non-work time unless the employer can establish special circumstances.
>
> As a corollary, where the employer, such as Purple, allows any personal use of the email, meaning non-work related use, the employees may use the email for communication about efforts to form, join or assist a labor organization or for mutual aid or protection. Here, Purple does this by creating a presumption that, during all non-work time, the employee may use the electronic systems without restriction for protected concerted activity or union activity. Here, Purple additionally does this by prohibiting only "uninvited email of a personal nature." (Jt. Ex. 1 p. 30–31.) By allowing personal email, which is unrelated to work at all times (work and non-work times), it has no justification to limit email about work place issues.
>
> Brief pp. 14-15 (footnotes omitted)

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For these reasons, the General Counsel's Answer Brief should be rejected to the extent it suggests that the use of electronic communications for Section 7-protected communications is limited to nonwork time. Workers and employers communicate orally during work time about work related issues. Workers and employers communicate by electronic communications. Such communications whether oral or by electronic communication systems including email are often Section 7-protected communications. The Board should grant the Cross-Exceptions of Charging Party and adopt a rule protecting such use during work time.

Dated: July 7, 2015

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On July 7, 2015, I served the following documents in the manner described below:

CHARGING PARTY'S REPLY TO ANSWERING BRIEF OF COUNSEL FOR GENERAL COUNSEL

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 7, 2015, at Alameda, California.

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